Filed 4/4/19 P. v. Rosales CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JEFFREY ALFREDO ROSALES, Defendant and Appellant.	B287149 (Los Angeles County Super. Ct. No. BA460015)

APPEAL from judgment of the Superior Court of Los Angeles County, Drew E. Edwards, Judge. Affirmed.

Jeanine G. Strong, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

Jeffrey Rosales was charged with multiple crimes after he embarked on a series of violent acts surrounding his eviction from his apartment. He was convicted of unlawfully burning an inhabited structure, assault with a deadly weapon, criminal threats, felony vandalism, and three counts of misdemeanor vandalism. He raises multiple issues on appeal. We reject his contentions and affirm.

PROCEDURAL BACKGROUND

Rosales was charged with the following counts at issue here[1]: arson of an inhabited dwelling (Pen. Code, § 451, subd. (b));[2] three counts of misdemeanor vandalism under $400 in damage (§ 594, subd. (a)); one count of felony vandalism over $400 in damage (§ 594, subd. (a)); assault with a deadly weapon (§ 245, subd. (a)(1)); and criminal threats (§ 422, subd. (a)). A jury acquitted him of arson and convicted him of the lesser offense of unlawfully causing a fire that burned an inhabited dwelling (§ 452, subd. (b)), and convicted him of the remaining counts. He was sentenced to nine years four months, which was comprised of consecutive terms on all counts.

FACTUAL BACKGROUND

1. Rosales Is Evicted

Rosales had been living in an apartment in a building in Highland Park for about four or five years. He became subject to an eviction process in March 2017.

---

[1] An additional count of assault with a firearm was charged but dismissed by the prosecutor.

[2] All undesignated statutory citations are to the Penal Code.

Lizbeth Vivero was an office manager for the property management company, and her husband Tehojares Quezada was a maintenance worker at the building. The couple did not live in the building; they lived about four and a half miles away. As will be relevant later, Vivero and Quezada owned two Dodge Ram trucks, one black and one white. Vivero usually drove the white one and Quezada usually drove the black one. They usually parked them on the street in front of their house. Rosales knew the trucks belonged to them.

In March 2017, Vivero served Rosales with a three-day notice to pay rent or quit. Rosales did not respond and continued to live in his apartment. On July 5, 2017, the sheriff put a lock-out notice on Rosales's door. Vivero was not evicting any other tenants at the time.

Between May and August 2017, Rosales engaged in a number of violent acts that formed the basis for the charges here.

2. Rosales Vandalizes the Apartment and Sets Fire to the Balcony and Interior

Vivero entered Rosales's apartment at the end of March 2017. The unit was "pretty chaotic," with garbage inside. Some areas looked "burnt" and "smoked" and walls were painted. After his eviction, it looked like a "demolished unit," with "rubbish, debris," and more painted walls, including one wall painted with obscenities. When Rosales was living there, his downstairs neighbor heard noises every day coming from his apartment in the early morning hours as though he was throwing or breaking things.

Around 10:30 p.m. on May 28, 2017, Antonio Alvarez, a handyman who lived on-site with his family, saw Rosales on his balcony. He was using a candle to light papers on fire. The

flames were about two to three feet high. Alvarez told Rosales to put out the fire, but Rosales told him not to worry and nothing would happen. Rosales told him to go back to his apartment. About an hour later, Rosales was still burning papers, and Alvarez told him again to put out the fire. Rosales said he was cooking carne asada, but Alvarez did not see or smell food.

Around 5:25 a.m. the next morning, a tenant told Alvarez that Rosales was burning down the building. Alvarez evacuated everyone from the building. He attempted to put the fire out but it had begun to spread beyond Rosales's balcony. Rosales sat on the steps outside, and Alvarez said to him, " 'Look what you have done.' " Rosales denied he had started the fire, and he ran away. The fire department extinguished the fire.

Alvarez boarded up Rosales's apartment, and the balcony was removed because it was so badly damaged. Rosales returned to the building a couple of hours later and tried to get into his apartment.

Two days later, an arson investigator inspected Rosales's apartment and described its condition. The walls appeared to have been vandalized. Drywall had been pulled from one wall. The fire alarms had been removed from the ceiling. There were burn marks above and below the crown molding. A star-shaped mark on the ceiling appeared to have been caused by an open flame. In the bathroom, the floor was black from burned garbage and a wall was burned. A burn mark created by an open flame was to the right of the sink. A burn mark was on the edge of the doorway into the kitchen. Debris was on the kitchen floor, and a cabinet had some charring. A drawer was completely burned and burnt debris was nearby. A candle and charcoal lighter fluid were in the kitchen.

The investigator opined the burn marks in the bathroom and kitchen drawer were intentionally made. He also opined the fire on the balcony was intentional. He believed the fires inside and outside the apartment were independent.

The investigator spoke with Rosales, who said he was not at the apartment at the time of the balcony fire. He claimed he was at a park with a friend, but could not recall the friend's name. When asked if he had returned to the apartment, Rosales first said yes then later said he had not.

3. Rosales Is Convicted of Misdemeanor Criminal Threats

On May 31, 2017, Quezada was at the apartment building to do some work in Rosales's unit when Rosales approached him. He took out two bullets and said one was for Quezada and the other was for himself. Rosales took out a third bullet and said it would be good for Quezada's head. He threw the first two bullets at Quezada's feet, put the third in his pocket, and left.

Quezada reported the incident to police and testified about it at a court hearing. Rosales was convicted of misdemeanor criminal threats. As discussed below, the vandalism of Quezada's and Vivero's trucks occurred after Quezada testified.

4. Rosales Vandalizes Quezada's and Vivero's Trucks Three Times

On July 14, 2017, Vivero parked the black truck in front of her apartment building. The next morning, she discovered the truck's windshield was broken and she found a brick inside the truck.

About a week later, on July 20, 2017, the white truck was parked in front of Vivero's building. On the morning of July 21,

2017, she found its windshield broken as well. The damage to each truck was about $200.

On the morning of July 22, 2017, Vivero discovered that all four tires to the white truck were slashed, the passenger-side window was broken, and the back of the truck was dented. The damage was $4,830.

She reported all the incidents to police. Vivero installed exterior cameras on her building and stopped parking the trucks on the street.

5. Rosales Assaults Alvarez With a Knife

On July 25, 2017, Alvarez and a coworker were doing repair work on the balcony of Rosales's unit. Alvarez was on the first floor and his coworker was above him on scaffolding. Rosales approached Alvarez and asked for the key to his apartment. Alvarez replied, "You have nothing to do here. You have nothing to do with this apartment." He turned his back to Rosales and went back to work. Rosales came at him with a knife. Alvarez's coworker shouted, "Watch out, watch out." Alvarez turned around and said, "What is it that you want?" Rosales folded the knife and put it behind his back. He told Alvarez, "Don't worry. I'll be right back. I'll be right back." Alvarez answered, "Don't worry. This is my work site. This is my job. Here is where I work, and I will wait for you."

6. Rosales Vandalizes Vivero's and Quezada's Truck a Fourth Time

On July 29, 2017, Vivero's and Quezada's black truck was parked in the back of their building, and Rosales was captured on security video breaking the truck's windshield with a small bat.

7. Rosales Threatens Alvarez Outside His Apartment

Rosales returned to Alvarez's apartment on August 5, 2017 around 11:30 p.m. Alvarez thought Rosales "didn't look well at all" and noticed that he was not wearing a shirt. He broke some windows and the glass on Alvarez's door. He yelled, "Come out, come out because I'm here to kill you. I'm here to kill you, you son of a [¶] . . . [¶] fuckin' mother. You come out because I am here to kill you. Come out. I'm going to kill you." He also said, "Kill me because I am here to kill you."

Alvarez's family was in his apartment at the time. Alvarez described Rosales as "yelling and assaulting and harassing my family." Alvarez asked loudly, "What are you doing here in my home? What are you doing here in my apartment?" Rosales "jumped" at him, trying to hit him, and Alvarez punched him twice. Rosales ran away screaming, "This is not over, I'm going to come back to kill you. I'm going to come back to kill you." After the incident, Alvarez felt "furious," "terrible," and "really bad about it because I never felt anything like that." But at trial he testified he was not in fear at the time. At trial, he wanted to "make perfectly clear . . . that if the county lets him out and he sets foot anywhere near my family or where I live, I'm going to defend myself. That's how it is. I am going to defend myself." He said "of course" he feared for his family's safety because his family "is first, and no one should mess with my family."

DISCUSSION

I. The Record Supported Charging the July 21 Misdemeanor Vandalism and the July 22 Felony Vandalism Separately, and a Section 654 Stay Was Not Warranted

Rosales argues he could not have been convicted of separate counts of misdemeanor and felony vandalism for the destruction of Vivero's white truck over the course of 24 hours between July 21 and July 22, 2017. He also argues that even if separate convictions were appropriate, his sentence on the misdemeanor count should have been stayed pursuant to section 654. We disagree on both points.

"A criminal defendant cannot be *punished* more than once for the same criminal act or for a series of criminal acts committed 'incident to one objective,' " but a defendant can generally "suffer multiple *convictions* for a single criminal act or series of related criminal acts." (*People v. Kirvin* (2014) 231 Cal.App.4th 1507, 1517 (*Kirvin*).) In *People v. Bailey* (1961) 55 Cal.2d 514, the California Supreme Court created an exception to the multiple conviction rule when it held that the value of property stolen from multiple acts of theft could be aggregated for grand theft. It explained: "Whether a series of wrongful acts constitutes a single offense or multiple offenses depends upon the facts of each case, and defendant may be properly convicted upon separate counts charging grand theft from the same person if the evidence shows that the offenses are separate and distinct and were not committed pursuant to one intention, one general impulse, and one plan." (*Id.* at p. 519.) As Rosales argues here, "[s]ubsequent decisions have construed *Bailey* as being a two-sided coin, granting criminal defendants

the right to insist upon the dismissal of all but one conviction when multiple crimes are unified by a single intent, impulse or plan." (*Kirvin, supra,* at p. 1517.)

In *People v. Whitmer* (2014) 59 Cal.4th 733 (*Whitmer*), the California Supreme Court limited *Bailey*'s reach in the context of a defendant's attempt to aggregate multiple grand theft offenses into a single count. The defendant was a manager of a motorcycle dealership and had been convicted of 20 counts of grand theft for 20 separate fraudulent sales to fictitious buyers. Each sale involved a different vehicle and occurred on 13 different dates; except for two dates, sales on the same date were to different fictitious buyers; and on the two dates involving sales to the same fictitious buyer, the transactions involved separate paperwork and documentation. (*Id.* at p. 735.) The defendant argued that the 20 grand theft counts should have been aggregated to a single count pursuant to *Bailey* because he committed them with a single intention, impulse, and plan. (*Id.* at p. 737.)

The court rejected his argument. It explained that in *Bailey*, "the defendant committed a single misrepresentation and then received a series of welfare payments due to that misrepresentation. Other than *omitting* to correct the misrepresentation and accepting the payments, the defendant committed no separate and distinct fraudulent acts." (*Whitmer, supra,* 59 Cal.4th at p. 740.) "*Bailey* concerned a single fraudulent act followed by a series of payments. The cases *Bailey* distinguished generally involved separate and distinct, although often similar, fraudulent acts. Accordingly, those cases involved 'separate and distinct' [citation] offenses warranting separate grand theft convictions. This case is not similar to *Bailey* but

rather to the cases it distinguished. Defendant committed a series of separate and distinct, although similar, fraudulent acts in preparing separate paperwork and documentation for each fraudulent transaction. Each fraudulent act was accompanied by a new and separate intent to commit that fraud." (*Ibid.*) The court held that "a defendant may be convicted of multiple counts of grand theft based on separate and distinct acts of theft, even if committed pursuant to a single overarching scheme." (*Id.* at p. 741.)[3]

Several pre-*Whitmer* cases addressed *Bailey*'s application to multiple acts of vandalism to consider whether misdemeanor vandalism counts could have been aggregated to meet the $400 threshold for felony vandalism. (See, e.g., *People v. Carrasco* (2012) 209 Cal.App.4th 715, 720 (*Carrasco*); *In re Arthur V.* (2008) 166 Cal.App.4th 61, 67 (*Arthur V.*); see also *In re David D.* (1997) 52 Cal.App.4th 304, 309 (*David D.*) [assuming *Bailey* applied to vandalism but finding *Bailey* did not apply to facts of case].) Without citing specific cases, the court in *Whitmer* "disapprove[d] of any interpretation of *Bailey* that is inconsistent" with its holding. (*Whitmer, supra,* 59 Cal.4th at p. 741.) The court in *Kirvin* believed *Whitmer* "jettisoned much of this earlier precedent," including *Carrasco* and *Arthur V.* (*Kirvin, supra,* 231 Cal.App.4th at p. 1518.)

---

[3] The *Whitmer* court nevertheless reversed all but one of the defendant's grand theft convictions because the rule it announced could not constitutionally apply to his crimes. (*Whitmer, supra,* 59 Cal.4th at p. 742.) Rosales committed his crimes in 2017, years after *Whitmer* was decided in 2014, so it applies here.

We need not decide whether *Whitmer* did in fact "jettison" these cases involving vandalism or whether its reasoning extends to multiple acts of vandalism. We review the decision to aggregate or separate offenses for substantial evidence (*Arthur V., supra,* 166 Cal.App.4th at p. 69), and we find substantial evidence supported an implied finding that Rosales committed two separate acts of vandalism under both *Whitmer* and *Bailey*.

Consistent with *Whitmer*, the evidence clearly supported a finding that Rosales committed two separate acts of vandalism of Vivero's white truck. Although the same property and victims were involved, the two incidents were separated by 24 hours, showing Rosales smashed the windshield and then left the scene for a full day before returning. During that time, Vivero discovered the damaged windshield but left the truck on the curb, and when Rosales returned, he inflicted more serious damage. This break in time showed that this was not a "continuing incident of vandalism" as Rosales contends.

Also consistent with *Bailey*, the evidence supported a finding that he acted with a separate intent and plan. Although he might have sought to *initially* retaliate against Vivero and Quezada for his eviction when he first smashed the truck's windshield, Vivero did not move the truck after discovering the initial damage. When Rosales returned the next night and discovered the truck in the same location, he could have believed that he failed to intimidate them and simply acted out of anger that his first act of vandalism did not prompt them to move the truck to a safer location. That inference is reinforced by the fact that the he inflicted far more damage to the truck the second time.

Given the specific facts of this case, we find the vandalism cases cited by Rosales distinguishable. (See *Carrasco, supra,* 209 Cal.App.4th at p. 724 [evidence supported aggregating acts of throwing statue through house window and breaking car windows during argument at same location]; *Arthur V., supra,* 166 Cal.App.4th at p. 69 [evidence supported aggregating acts of breaking windshield and cell phone at same location within "very brief time period"]; but see *David D., supra,* 52 Cal.App.4th at pp. 310–311 [evening of tagging throughout city causing damage to multiple victims supported 34 acts of vandalism].) The record supported Rosales's separate convictions for misdemeanor and felony vandalism.

For the same reasons, the trial court was not required to stay punishment for the misdemeanor vandalism count under section 654. As relevant here, section 654 provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (§ 654, subd. (a).)

The section precludes punishment for multiple crimes arising from an "indivisible course of conduct." (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.) "Thus, if all of the crimes were merely incidental to or were the means of accomplishing or facilitating a single objective, the defendant may receive only one punishment." (*Ibid.*) As here, when the record is silent on the court's reasons for refusing to stay punishment under section 654, we imply the court found separate objectives and review that finding for substantial evidence. (*Islas*, at p. 129.)

For the reasons already discussed, the record supported the trial court's implied finding that Rosales harbored separate objectives in first vandalizing Vivero's truck and then returning a day later to vandalize it more extensively. (See *People v. Trotter* (1992) 7 Cal.App.4th 363, 365–366 [three gunshots at police officer within about a minute during pursuit supported separate sentences for assault].) The refusal to stay the sentence for the misdemeanor count was proper.

II. The Prior Misdemeanor Criminal Threats Conviction Was Properly Admitted

Rosales contends the trial court erred pursuant to Evidence Code sections 1101 and 352 when it admitted evidence that he was convicted of misdemeanor criminal threats after he threatened Quezada and threw two bullets at his feet. We are not persuaded.

First, Rosales failed to object to the admission of this evidence, so he forfeited this contention. (Evid. Code, § 353, subd. (a); *People v. Demetrulias* (2006) 39 Cal.4th 1, 20–21 (*Demetrulias*).) We will nonetheless address the merits because Rosales argues his trial counsel was ineffective for failing to object.

We review the trial court's admission of this evidence for abuse of discretion. (*People v. Kipp* (1998) 18 Cal.4th 349, 369 (*Kipp*).) We find no merit to his contention, so his counsel was not required to assert a meritless objection. (*People v. Baker* (2018) 20 Cal.App.5th 711, 720.)

At trial, Quezada testified to his interaction with Rosales on May 31, 2017 leading to the conviction. After the close of evidence, the parties stipulated to Rosales's misdemeanor conviction in front of the jury and to the fact that Quezada

testified at a hearing in connection with that case. During closing, the prosecutor suggested the jury should use the conviction as evidence of Rosales's motive for the later vandalism of Quezada's and Vivero's trucks.[4] The prosecutor also argued it showed Rosales's intent: "The thing that all these people have in common, they are all involved with Mr. Rosales in evicting him. Antonio [Alvarez] is the property manager that lives on the side. They are all employees. They work together. Liz [Vivero] is his office manager, and Teho [Quezada] is the handyman there. He has the same intent for all of them. He has retaliated for being evicted. [¶] You can also consider it in trying to figure out what happened on the day of that fire. If the defense comes up and says on the day of the accident he was trying to cook some carne asada, you can consider all these together in finding whether it was an accident. That is why you heard about it."

Generally uncharged crimes are inadmissible to prove criminal propensity, but they may be admitted to prove other facts such as motive and intent. (Evid. Code, § 1101, subds. (a)–(b).) To show intent, "the uncharged crimes need only be 'sufficiently similar [to the charged offenses] to support the inference that the defendant " 'probably harbor[ed] the same

---

[4] In the context of discussing Rosales's motive, the prosecutor briefly suggested that the conviction showed Rosales "is the person who" committed the vandalism. On appeal, Rosales argues the conviction was not sufficiently similar to the charged crimes to show identity. We need not address this issue. Rosales's identity was not seriously disputed at trial, and the prosecutor focused on the relevance of the conviction to show motive and intent, not identity. As we explain, the conviction was highly probative of motive and intent.

intent in each instance.' " ' " (*Kipp, supra,* 18 Cal.4th at p. 371.) As for motive, "the probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus." (*Demetrulias, supra,* 39 Cal.4th at p. 15.)

Here, Rosales's prior conviction was unquestionably probative of his motive and intent for the charged crimes. As the prosecutor argued, Rosales's entire course of conduct giving rise to the charged crimes was an ongoing campaign motivated by his desire to harass and retaliate against the individuals involved with his apartment building and his eviction. His uncharged misdemeanor conviction fell within that pattern and demonstrated he harbored the same intent throughout his harassment campaign. It was also highly probative of Rosales's retaliatory motive for going to Vivero's and Quezada's home and vandalizing their trucks four different times after Quezada testified during the hearing for the prior conviction.

The trial court also acted within its discretion in finding the evidence more probative than prejudicial pursuant to Evidence Code section 352. (*Kipp, supra,* 18 Cal.4th at p. 371.) The misdemeanor conviction was highly probative and far less serious than the multiple charged crimes. And since Rosales had been convicted of the uncharged crime, there was little risk the jury would feel the need to punish him for it. (See *Demetrulias, supra,* 39 Cal.4th at p. 19.)

III. The Invited Error Doctrine Bars Rosales's Challenge to the CALCRIM No. 375 Jury Instruction

Rosales contends the trial court erred in not giving CALCRIM No. 375, which would have instructed the jury on the

limited use of his uncharged misdemeanor conviction. During trial, the *prosecutor* requested CALCRIM No. 375 in light of the admission of Rosales's uncharged crime. Defense counsel expressly objected to the instruction, arguing this evidence was not admitted pursuant to Evidence Code section 1101 and the instruction would confuse the jury. The court accepted defense counsel's position and did not "believe that the evidence regarding the uncharged conduct regarding the victim Teho Quezada was admitted pursuant to Penal Code [*sic*] section 1101.B. I also think it is prejudiced against Mr. Rosales under Evidence Code 352. Over the objection of the People, the court will not give CALCRIM 37[5]."

We will not comment on the correctness of these statements by the court and defense counsel. Having successfully objected to the use of CALCRIM No. 375, Rosales invited any error and cannot raise the issue on appeal. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49.)[5]

IV. Substantial Evidence Supported the Criminal Threats Count

Rosales contends insufficient evidence supported his criminal threats conviction pursuant to section 422 involving his encounter with Alvarez outside his apartment. We disagree.

" 'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to

---

[5] Rosales states in an argument heading in his opening brief on appeal that his counsel was ineffective for objecting, but he did not address this issue in his brief. We find the argument forfeited and do not address it. (Cal. Rules of Court, rules 8.204(a)(1)(B) & (C), 8.360(a).)

determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." ' " (*People v. Wilson* (2010) 186 Cal.App.4th 789, 805 (*Wilson*).)

To prove a violation of section 422, the prosecution must prove five elements, namely, "(1) that the defendant 'willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person,' (2) that the defendant made the threat 'with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out,' (3) that the threat–which may be 'made verbally, in writing, or by means of an electronic communication device'–was 'on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat,' (4) that the threat actually caused the person threatened 'to be in sustained fear for his or her own safety or for his or her immediate family's safety,' and (5) that the threatened person's fear was 'reasonabl[e]' under the circumstances." (*People v. Toledo* (2001) 26 Cal.4th 221, 227–228.) Rosales challenges the third and fourth elements.

As to the third element, Rosales contends the evidence was insufficient to show his threats to Alvarez were unconditional. The argument is meritless. He cites a portion of the transcript of Alvarez's cross-examination to claim he said to Alvarez, "If you don't kill me now, I'll kill you." His representation of the record is misleading. This statement was made by *defense counsel* when

questioning Alvarez. Defense counsel asked him, "He was yelling, 'If you don't kill me now, I'll kill you'?" Alvarez responded, "Exactly. '*Kill me because I am here to kill you*.' " (Italics added.) Alvarez's actual testimony clearly supported the jury's implied finding that Rosales's threat was unconditional.

Rosales also contends the evidence did not show his threats were immediate by pointing to his statement when he ran away, "This is not over, I'm going to come back to kill you. I'm going to come back to kill you." This ignores Alvarez's testimony about the other unconditional threats Rosales made when he arrived at Alvarez's apartment and confronted him before running away, which supported the jury's finding that the threat was immediate.

Rosales further contends he had no present ability to execute the threats since he was not armed, appeared "incapable of inflicting deadly injuries with his hands," and he ran away. "While the third element of section 422 also requires the threat to convey ' "a gravity of purpose and an immediate prospect of execution of the threat," ' it 'does not require an immediate ability to carry out the threat.' " (*Wilson, supra,* 186 Cal.App.4th at p. 807; *In re David L.* (1991) 234 Cal.App.3d 1655, 1660.) In any case, the jury could have reasonably inferred Rosales did have a present ability to carry out his threats, given he "didn't look well at all," he was yelling threats at Alvarez, broke several windows at Alvarez's residence apparently with his bare hands, and "jumped" at Alvarez, trying to hit him.

On the fourth element, Rosales contends the evidence was insufficient to show his threats placed Alvarez in sustained fear for himself or his family. As used in section 422, "sustained fear" "means a period of time that extends beyond what is momentary,

fleeting, or transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) "Sustained fear" has "both an objective and subjective component; [the victim's] fear must have been reasonable, and it must have been real." (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 417 (*Ortiz*).) "The victim's knowledge of defendant's prior conduct is relevant in establishing that the victim was in a state of sustained fear." (*Allen,* at p. 1156.)

Alvarez testified he feared for his family after these threats but he denied he feared for his own safety. Respondent argues Alvarez's fear for his family satisfied the sustained fear element of section 422. The prosecutor also argued that theory in closing at trial. Sustained fear for the safety of one's immediate family satisfies the language of section 422, but the jury was instructed in this case that the fear element of criminal threats required the People to prove "the threat actually caused Antonio Alvarez to be in sustained fear for *his own safety*," not that of his family. (Italics added.) After closing arguments, the prosecutor discovered the discrepancy and requested the court reinstruct the jury with the additional language from section 422 regarding fear for one's immediate family because "that is part of the facts of our case and part of my theory of the 422." The court denied the request to reinstruct the jury.

The parties do not address this issue on appeal. We also decline to address it because, consistent with the instruction given to the jury on section 422, the evidence was sufficient for the jury to infer that Alvarez was in sustained fear for his *own* safety, despite his testimony to the contrary.

Appearing violent, angry, shirtless, and apparently unstable, Rosales confronted Alvarez in front of his apartment, shouting death threats and breaking windows. Alvarez loudly

questioned why Rosales was at his apartment. Rosales attacked, forcing Alvarez to punch him twice. As Alvarez knew, this all occurred after Rosales had been evicted from his apartment, had set his own balcony on fire, and had previously assaulted Alvarez with a knife. No doubt these circumstances would have placed any reasonable person in sustained fear of his own safety.

At trial, Alvarez denied he was in fear of Rosales, but the jury had a reasonable basis to reject his denial and infer he actually was in sustained fear of Rosales. Alvarez testified he felt "furious," "terrible," and "really bad about it because I never felt anything like that," all of which the jury could have interpreted as expressing fear without saying so explicitly. He also testified that he wanted to "make perfectly clear . . . that if the county lets him out and he sets foot anywhere near my family or where I live, I'm going to defend myself. That's how it is. I am going to defend myself." The jury could have inferred from that statement that Alvarez did, in fact, fear that Rosales would return to fulfill his earlier threats.

The prosecutor argued in closing that Alvarez may not have been forthcoming about his lack of fear: "My take on why he wouldn't say he was in fear, some people they are uncomfortable talking about being in fear. For lack of a better term, being macho. You saw him swinging his fist. I got a sense that is what was going on there. You were there also. It is ultimately your job to decide the weight of the evidence. That is what the evidence shows. When he is actually sitting facing Mr. Rosales, it was hard to say, yeah, I was in fear of him."

A victim need not testify to his or her sustained fear to satisfy section 422; circumstantial evidence is sufficient. (*Ortiz, supra,* 101 Cal.App.4th at p. 417.) On this record, the jury could

have reasonably inferred that Alvarez experienced sustained fear for his own safety, but refused to say so out loud in court when facing Rosales, his assailant. Sufficient evidence supported Rosales's section 422 conviction.

V. Substantial Evidence Supported the Assault with a Deadly Weapon Count

Rosales contends the evidence was insufficient to support his conviction for assault with a deadly weapon stemming from his assault on Alvarez with a knife. He challenges two elements of the crime, namely, that he " 'did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person,' " and that when he acted he " 'had the present ability to apply force with a deadly weapon other than a firearm.' " (*People v. Aguayo* (2019) 31 Cal.App.5th 758, 763 (*Aguayo*); see CALCRIM No. 875.)

We find no merit to his arguments, which ignore evidence and inferences that supported the jury's verdict. Although Rosales was two feet away from Alvarez and folded the knife when Alvarez turned around, the evidence showed that while Alvarez's back was turned, Rosales had the knife out and was moving toward him. Alvarez's coworker yelled "Look out," suggesting Rosales was preparing to attack Alvarez, and may have done so if Alvarez had not turned around. This evidence amply supported the jury's findings that Rosales did an act that would " 'directly and probably result in the application of force to' " Alvarez and he " 'had the present ability to apply force' " with the knife. (*Aguayo, supra,* 31 Cal.App.5th at p. 763.)

VI. The Court Did Not Improperly Permit the Prosecution to Expand the People's Arson Theory

Rosales contends the trial court deprived him of due process and a fair trial when it erroneously permitted the prosecution to expand its theory of arson to include not only the balcony fire, but the fires that had been set inside the apartment. We disagree.

The information charging Rosales with arson did not allege a particular theory of arson, but merely alleged that, "On or about May 29, 2017," he "did willfully, unlawfully, and maliciously set fire to and burn and cause to be burned an inhabited structure and inhabited property located at" the address of his apartment building. At the preliminary hearing, the arson investigator testified to the condition inside Rosales's apartment, including the various burn marks in the living room, kitchen, and bathroom. He opined the fires inside and outside on the balcony were independent and intentional. As set out in the fact section above, he likewise testified at trial that the burn marks in the bathroom and kitchen drawer were intentionally made, the fire on the balcony was intentional, and the fires inside and outside the apartment were independent.

After the close of the People's case and during discussion of jury instructions, the prosecutor requested the court give CALCRIM No. 207, which states: "It is alleged that the crime occurred on [or about] _____ <*insert alleged date*>. The People are not required to prove that the crime took place exactly on that day but only that it happened reasonably close to that day."

Defense counsel expressed the concern that the arson charge should be limited to the balcony fire, not any of the interior fires. He argued, "I think the arson charge is specific to

the date of May 29th because there has been other evidence of the other charring. Those were undated. We wouldn't want the jury to say that drawer was definitely burned, and we don't know what day it was. In that regard, I have a problem." The prosecutor explained he planned to argue "there were multiple completed arsons. The evidence supported that. I am entitled to argue there are several burns inside of the apartment that would support an arson charge. I don't think I am limited to argue only the balcony was arson." The court ruled that the prosecution was entitled to argue there were multiple arsons and CALCRIM No. 207 would be given.

The issue came up again during discussion of the prosecution's requested unanimity instruction. The prosecutor argued again that there were multiple fires and "the jury should be instructed if they do convict Mr. Rosales of arson, we would agree on which one [was] committed." Defense counsel responded, "We heard about structure property being burned inside. We don't know when those fires were caused at all. They may have been five years ago. Maybe they are statute of limitations. [¶] In fact, I move to dismiss any allegation of the interior charge to be statute of limitations. This is about the balcony. It is not about the inside. I think the district attorney should be prohibited from arguing the inside charge. It is the balcony. We all know that."

The court rejected defense counsel's position, stating, "It is up to the jury to decide which fires here are at issue. Over the objection of . . . the defense . . . the People can argue about the fires set on the balcony and any fires which were set inside. In my view, that is an issue for the jury to decide." The court indicated it would give the requested unanimity instruction.

Defense counsel brought the issue up again later, arguing that he was "completely blindsided this morning when the People said they would seek a conviction of the arson charge regarding the inside fires. I saw nothing in the pleading they were going to do that. Nothing indicating up until this morning, upon their theory. [¶] You can read the preliminary hearing transcript. There is nothing in there about the argument about holding Mr. Rosales to answer, indicating that the People are proceeding that the fires on the inside had anything to do with count [2], other than the circumstantial evidence as to intent, whether it is intentional, malicious, or reckless. [¶] I think it is a whole can of worms that has been opened up legally, including the fact about the property. It is a misdemeanor. Or injury to the property other than burning. [¶] I am not asking to reopen the instructions. I want the record to reflect I was blindsided."

The court again overruled these objections, stating, "The record will so reflect [defense counsel's] position. There has been no information that the People have not turned over all appropriate discovery pursuant to Penal Code section 1054. I don't find any reason to have the case not go forward, and the case will go forward."

In closing, the prosecutor argued multiple fires were lit and the prosecution did not have to prove the exact date the fires were lit inside. He further argued each of the fires was independently arson, although Rosales "has gotten a break" because the prosecution "only charged him with one count of arson." He also argued the interior fires showed Rosales maliciously intended to start the outside balcony fire.

"A criminal defendant . . . has a federal constitutional right to ' "be informed of the nature and cause of the accusation." ' "

(*People v. Quiroz* (2013) 215 Cal.App.4th 65, 70 (*Quiroz*).) Due process prevents the prosecution from affirmatively misleading or ambushing the defense with a new theory. (*Id.* at p. 71.) Notice of a new theory is constitutionally sufficient if the defendant is alerted to it by the evidence presented at the preliminary hearing or "by the People's express mention of that theory before or during trial sufficiently in advance of closing argument." (*Id.* at pp. 70–71.)

These standards were met here. The arson investigator's preliminary hearing testimony matched his testimony at trial, giving Rosales ample notice of and opportunity to rebut the facts underlying the prosecution's theory that the arson count could be based on the interior fires or exterior fires. While the prosecutor raised the theory only on the morning before closing arguments while discussing jury instructions, Rosales has pointed to nothing to suggest the prosecutor intentionally ambushed or misled him about the new theory. Nor does he suggest his counsel would have done anything differently at trial if he had notice earlier. Under the circumstances, the prosecution's purported late notice did not " 'unfairly prevent[] [defense counsel] from arguing his . . . defense to the jury or . . . substantially mislead [counsel] in formulating and presenting arguments.' " (*Quiroz, supra,* 215 Cal.App.4th at p. 71.)

We reject Rosales's speculation that the jury compromised and found him guilty of unlawfully causing the balcony fire based on the prosecutor's comment in closing that Rosales received a "break" because only one arson count was charged. As we discuss more fully below, the jury initially deadlocked on the arson count, and it ultimately found Rosales not guilty of arson and guilty of the lesser offense of unlawfully starting a fire. The jury obviously

did not convict him of a single count of arson because it perceived he had gotten a break when the prosecution charged him with only one count.

VII. The Court Properly Instructed the Jury to Continue Deliberating

Rosales contends the trial court "improperly coerced" the jury to continue deliberating on the arson count when they suggested they were deadlocked. We disagree.

After deliberating for approximately two hours, the jury sent a note to the court stating it was "unable to reach an agreement on the greater and lesser charges on count two. What is the next action that is required of the jury? The jury has reached a verdict on all remaining counts, three, four, five, six, seven and eight."

The court told the jury: "I want to thank you all very much for your hard work, but in my view there is a little bit more work that needs to be done in this matter. You have deliberated about two hours. That is pretty good. That is up to seven counts. I am going to order you to go back and deliberate a little bit more among yourselves. A trial uses a lot of resources as you might imagine. We want you all to have a full discussion about the last charge. If you come back in the next hour or so and you don't have a verdict, we'll talk about it then. In my view the court does not feel you have deliberated long enough to have a hung jury on count two. [¶] If you would all go back in the jury room and deliberate further and try to return a verdict on count two. Thank you very much." The jury thereafter found Rosales not guilty of arson but guilty of the lesser offense of unlawfully causing a fire.

"Section 1140 provides in relevant part that a 'jury cannot be discharged' without having rendered a verdict unless, 'at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree.' 'The decision whether to declare a hung jury or to order further deliberations rests in the trial court's sound discretion.' [Citations.] However, a court must exercise its power under section 1140 without coercing the jury, and 'avoid displacing the jury's independent judgment "in favor of considerations of compromise and expediency." ' [Citation.] . . . '[A]ny claim that the jury was pressured into reaching a verdict depends on the particular circumstances of the case.' " (*People v. Brooks* (2017) 3 Cal.5th 1, 88.)

No such coercion occurred here. The jury had deliberated for two hours on seven counts before expressing a deadlock on the "greater and lesser charges" for the arson count. Given the short period of deliberations and the jury's apparent disagreement on arson versus the lesser offense, the court acted well within its discretion in directing the jury to continue deliberating on the final count. Contrary to Rosales's contention, the court did not need to expressly ask the jury if it was "reasonably probable" that it could reach a verdict, as that could have been readily inferred from the circumstances.

There is no merit to Rosales's other complaints about the court's comments. The court's statement that if the jury remained deadlocked after another hour of deliberations, the court and jury would "talk about it" could not have been rationally perceived as a "threat of repercussions," as Rosales contends. Also, while the court referred to a trial "us[ing] a lot of resources as you might imagine," the court gave no further

context for this comment, and the jury would not have rationally perceived it as any kind of pressure to reach a verdict. Finally, the court's comment that the jury's deliberations were "pretty good" did not signal to the jury that not reaching a verdict was necessarily "bad." Reasonably viewed, the court was referring to the jury's prior two hours of deliberations, not necessarily the verdicts on the other counts. The record does not support Rosales's view that that the "jury undoubtedly felt pressure to be good and reach a verdict." When viewed in the full context of the court's statement to the jury, the court's comments did not displace the jury's independent judgment.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

GRIMES, J.

STRATTON, J.